

HALLIBURTON II AT FOUR: HAS IT CHANGED THE OUTCOME OF CLASS CERTIFICATION DECISIONS?

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ABSTRACT

The U.S. Supreme Court's decision in *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*) appeared to give corporate defendants a new tool to defeat class certification in the context of securities fraud class action litigation: rebutting the requisite presumption of reliance by showing a lack of "price impact"—a term that *Halliburton II* used to describe whether the price of an allegedly affected company's stock went up or down. However, based on an empirical study of pre- versus post-*Halliburton II* class certification decisions, it appears that the outcomes of class certification decisions have become even more hostile to defendants, as class certification is now being granted with greater frequency post-*Halliburton II*.

This Article attempts to answer why this is occurring and suggests that two key drivers are responsible. First, although corporate defendants have advanced *Halliburton II*'s lack-of-price-impact argument, they have done so at their own peril because the post-*Halliburton II* courts tend to narrowly construe whether there is a lack of price impact. In particular, the post-*Halliburton II* courts have required defendants to show a lack of price impact at the time that the truth—or corrective information entered the market (the "back-end"), not at the time the misrepresentation (the "front-end") was made. This standard has been fatal to the majority of arguments based on the lack-of-price-impact because plaintiffs plead back-end dates where there was demonstrable price movement. Moreover, courts do not allow defendants to show that the price movement on the selected date was caused by benign factors, nor do they accept alternative back-end dates more favorable to defendants.

Second, when defendants attempt to make a price impact-based argument, the majority of the post-*Halliburton II* courts have placed

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the burden of persuasion—not the lower burden of production—on defendants. The burden of persuasion is a heavy burden that corporate defendants have overwhelmingly not been able to satisfy. These two factors were not decided by *Halliburton II*, and the post-*Halliburton II* courts have subsequently construed these issues to the detriment of corporate defendants.

Given the current lay of the land, it is uncertain what can be done to address the foregoing issues. This Article suggests that until the Supreme Court addresses these issues, the post-*Halliburton II* courts ought to address the imbalance by permitting defendants to show lack of *both* front- and back-end price impact. The Article also proposes that the post-*Halliburton II* courts should place the onus on plaintiffs to plead that front-end lack of price impact is an unreliable metric in opposition to defendants' rebuttal argument.

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INTRODUCTION

In *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 279–80 (2014) (*Halliburton II*), the U.S. Supreme Court seemingly gave corporate defendants a tool to defeat class certification by allowing defendants to rebut the presumption of reliance on an alleged misrepresentation by showing that the alleged fraud did not impact a company’s stock price.¹ Before *Halliburton II*, commentators believed that if a complaint survived a motion to dismiss, class certification was essentially *fait accompli*.² Thus, *Halliburton II* appeared to provide corporate defendants with a tool to defeat class certification.³

Since *Halliburton II* was decided five years ago, corporate defendants have had numerous opportunities to make the lack-of-price-impact argument.⁴ After conducting an empirical review of the post-*Halliburton II* decisions, this Article seeks to answer two questions: whether *Halliburton II* has had an impact on the outcome of class certification litigation; and why or why not.

1. See *infra* Section II.A & C; *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), 573 U.S. 258, 279–80 (2014) (holding that “defendants may introduce price impact evidence at the class certification stage.”).

2. See *infra* notes 60–61.

3. *Halliburton II*, 573 U.S. at 279.

4. See *infra* Section III.B.

With regard to *Halliburton II*'s impact, it is clear that class certification has been granted at a conspicuously higher rate than pre-*Halliburton II*.⁵ There are two drivers for this result.

First, the vast majority of the post-*Halliburton II* courts have been willing to consider the lack of price impact only at the time that plaintiffs plead that the truth of a purported misrepresentation—or corrective information—entered the market (“back-end”), to the exclusion of a showing at the time of the alleged misrepresentation (“front-end”). It is difficult for most corporate defendants to show a lack of back-end price impact because plaintiffs typically plead back-end dates where there was demonstrable price impact.⁶ The post-*Halliburton II* courts have arrived at this standard by application of the price maintenance theory. Under the price maintenance theory, front-end price impact is unreliable for determining whether a misrepresentation affected a stock's price because the alleged fraud could be artificially maintaining the stock's price where there might otherwise be a loss.⁷ Because corporate defendants are forced to prove a lack of price impact at the back-end, in a critical number of cases, defendants have attempted to move up the class end date to an earlier date—where there was no demonstrable price impact—to when the truth was purportedly available to the market.⁸ However, the majority of the post-*Halliburton II* courts have rejected this argument due to the perceived barrier of Supreme Court precedent.⁹ Accordingly, corporate defendants are given an impossible task of proving a lack of back-end price impact on a date when there *was* price impact.

Second, the overwhelming majority of the post-*Halliburton II* courts have required defendants to show a lack of price impact by satisfying the burden of persuasion, in contrast to the comparably lower burden of production.¹⁰ A party bearing the burden of persuasion—as the label infers—must “persuade” a judge that there was no price movement. In contrast, a party bearing the burden of production has a relatively lower burden of simply producing evidence, such as an expert report, to prove a lack of price impact.¹¹ There is a correlation between the burden of proof and the outcome of class certification decisions. The majority of the post-

5. See *infra* Section III.A.

6. See *infra* Section IV.A.

7. See *infra* Section IV.A.1.

8. See *infra* Section IV.A.2; *Halliburton II*, 573 U.S. at 278.

9. See *infra* Section IV.A.2.

10. See *infra* Section IV.B.

11. See *infra* Section IV.B.

Halliburton II courts that have required defendants to bear the burden of persuasion, routinely found that defendants did not do so, thus leading to a grant of class certification.

This Article proceeds in four parts. First, it examines the requisite standards governing class certification under the Federal Rules of Civil Procedure (“FRCP”), the elements of a securities fraud claim under Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Rule 10b-5,¹² and *Halliburton II*’s lack-of-price-impact argument. Second, it analyzes the outcome of securities fraud class certification decisions in the four years before and after *Halliburton II*. Third, it explains the trends behind the outcome of securities class certification decisions. Finally, it proposes a solution to make class certification litigation consistent with Supreme Court precedent: courts should force plaintiffs to affirmatively prove that front-end price impact is unreliable, instead of simply presuming its unreliability.

I. CLASS CERTIFICATION UNDER RULE 23 AND ITS RELATION TO SECURITIES FRAUD LITIGATION

A. THE BENEFITS AND DRAWBACKS OF CLASS ACTIONS AND THE IMPORTANCE OF CLASS CERTIFICATION

Class actions have numerous benefits and drawbacks. In the benefits column: class actions allow for the vindication of the rights of a class that could not otherwise bring a claim;¹³ overcome the hurdle that individual recoveries do not provide sufficient incentive to bring a claim by aggregating financial recovery on a class-wide basis;¹⁴ and collaterally

12. 15 U.S.C. § 78j(b) (2012); 17 C.F.R. § 240.10b-5 (2012) [hereinafter “Rule 10b-5”], (collectively “10(b)”).

13. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (indicating that class actions protect “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”) (citation omitted).

14. *Id.* (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.”) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.”); see also *Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) (“[W]here it is not economically feasible to obtain relief within the traditional framework of a

ensure that a defendant whose conduct injures a large number of potential plaintiffs is held accountable for his or her actions.¹⁵ The Supreme Court has recognized that these benefits expressly apply in securities class actions.¹⁶ In the drawbacks column: class actions can, among other things, present conflicts of interest between class attorneys and the class regarding attorney's fees,¹⁷ and additionally, they can lead to nuisance-based "strike suit" filings.¹⁸

Nevertheless, it is unremarkable to observe that the outcome on a motion for class certification is a "crucial inflection point" in a case.¹⁹ A decision to certify a class can have "enormous ramification[s]" by "turning potential losses from relatively small amounts into potentially massive exposure."²⁰ A certified class exerts massive pressure on

multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

15. *Roper*, 445 U.S. at 338 ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise.").

16. *Amchem*, 521 U.S. at 615 (specifying that class actions will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.").

17. See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 671–72 (1986) (observing the existence of an inherent conflict that arises between the class attorneys and their clients, with respect to, among other things, attorneys' fees); see also A.C. Pritchard, *Stoneridge Investment Partners v. Scientific-Atlanta: The Political Economy of Securities Class Action Reform*, 2008 CATO SUP. CT. REV. 217, 227 (noting that "the combination of the potential for enormous judgments and the cost of litigating securities class actions means that even weak cases may produce a settlement if they are not dismissed at the complaint stage.").

18. *Strike Suit*, BLACK'S LAW DICTIONARY (10th ed. 2014) (a strike suit is a lawsuit "based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement."); see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742 (1975) ("The risk of strike suits is particularly high in [securities] cases . . ."); H.R. Rep. No. 105-803 at 13 (1998) (The purpose of [securities] strike suits is to extract a sizeable settlement from companies that are forced to settle, regardless of the lack of merits of the suit, simply to avoid the potentially bankrupting expense of litigating."); see also Vincent E. O'Brien, *The Class-Action Shakedown Racket*, WALL ST. J., Sept. 10, 1991, at A20 (out of 330 securities class actions, three cases were decided by a jury, five were dismissed or withdrawn, and ninety-six percent were settled out of court).

19. *George v. China Auto. Sys., Inc.*, No. 11 Civ. 7533 (KBF), 2013 U.S. Dist. LEXIS 93698, at *1 (S.D.N.Y. July 3, 2013).

20. *Id.* The Supreme Court and the Advisory Committee on the FRCP have adopted a similar view. See FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment (observing that "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011)

defendants to settle to avoid incurring the costs of defending a class action and running the risk of bankruptcy.²¹ Thus, a class certification decision may very well be outcome determinative on a securities fraud class action.

B. STANDARDS FOR CLASS CERTIFICATION

Class certification is governed by FRCP 23 (“Rule 23”), which requires a putative class action plaintiff to satisfy both Rule 23(a) and one of the three conditions set forth in Rule 23(b).²² Rule 23(a) requires a putative class action plaintiff to demonstrate that (1) the class is sufficiently numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the class representative are typical of the claims of the other class members; and (4) the representative party will fairly and adequately protect the interests of the class.²³

Securities fraud class actions typically proceed under FRCP 23(b)(3). Section (b)(3) requires that “questions of law or fact common to class members predominate over any questions affecting only individual members” (the “Predominance Element”) and that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy” (the “Superiority Element”).²⁴

In reviewing whether a putative class action plaintiff meets the Predominance Element under Rule 23(b)(3), district courts have a duty to take a “close look” and conduct “a rigorous analysis” that is “far more

(“Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Courts have noted the risk of ‘*in terrorem*’ settlements that class actions entail . . .”).

21. See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (“When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.”).

22. See FED. R. CIV. P. 23; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (noting that “[i]n addition to satisfying Rule 23(a)’s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).”); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345–46 (2011) (noting that the moving party must first demonstrate the Rule 23(a) elements and satisfy one of the three Rule 23(b) requirements).

23. FED. R. CIV. P. 23(a).

24. FED. R. CIV. P. 23(b)(3); see also *Barrie v. Intervoice-Brite, Inc.*, No. 3:01–CV–1071–K, 2009 WL 3424614, at *8 (N.D. Tex. Oct. 26, 2009) (“These requirements are commonly known as ‘predominance’ and ‘superiority.’”).

demanding than the ‘commonality’ requirement under Rule 23(a).”²⁵ Indeed, it is an abuse of discretion for a district court to fail to conduct this “rigorous analysis.”²⁶ In practice, it is difficult to determine how far into the merits a district court may delve. On one end of the spectrum, district courts have “a duty to actually decide [questions of fact or law relevant to a class certification matter] and not accept it as true or construe it in anyone’s favor.”²⁷ On the other end, courts do not have a “license to engage in free-ranging merits inquiries at the certification stage.”²⁸ At the conclusion of conducting its rigorous analysis, if a district court has any doubt as to whether the requirements of Rule 23 have been met, it “should refuse certification until they have been met.”²⁹

C. DEMONSTRATING RELIANCE—THE “PREDOMINATING” ISSUE IN A SECURITIES FRAUD CLASS CERTIFICATION MOTION

Section 10(b) of the Exchange Act makes it unlawful for any person “[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe.”³⁰ Pursuant to Rule 10b-5, “[i]t shall be unlawful for any person To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they

25. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013) (quoting *Amchem*, 521 U.S. at 623–24); *Wal-Mart*, 564 U.S. at 350–51 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 151 (1982)).

26. *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 783 (8th Cir. 2016) (“A district court abuses its discretion if it fails to conduct the ‘rigorous analysis’ Rule 23 requires.”).

27. *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1234 (11th Cir. 2016) (citing *Comcast*, 569 U.S. at 33–34).

28. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974) (at class certification, “the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather, whether the requirements of Rule 23 are met.”) (citation omitted).

29. *Compare Brown*, 817 F.3d at 1234 (citation omitted) *with Anwar v. Fairfield Greenwich*, 289 F.R.D. 105, 111 (S.D.N.Y. 2013) (“[I]f there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.”) (quoting *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968)).

30. 15 U.S.C. § 78j(b) (2012).

were made, not misleading.”³¹ The federal courts have long interpreted the elements of a private securities fraud litigation to be: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.³²

“Reliance” in the securities fraud context means that a plaintiff bought or sold a security in response to a defendant’s statement or conduct.³³ Reliance is an essential element of a securities fraud action.³⁴ Because proving reliance on an individualized basis for a shareholder class—which could encompass tens of thousands of plaintiffs—would be prohibitively burdensome,³⁵ the Supreme Court has allowed a putative plaintiff class to satisfy the reliance element by pleading a presumption in favor of reliance.

The Supreme Court has recognized two types of presumptions of reliance: the *Affiliated Ute* presumption for cases where the alleged fraud primarily occurs through an omission of material fact,³⁶ and the Fraud-on-the-Market presumption for affirmative misrepresentations, adopted

31. 17 C.F.R. § 240.10b-5 (2012). It is important to distinguish 10b-5(b) misrepresentation and omission claims from Rule 10b-5(a) and (c) fraudulent scheme and “operate as a fraud” because they have different elements.

32. See, e.g., *Amgen*, 568 U.S. at 460–61. See generally *Halliburton II*, 573 U.S. 258 (2014); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011); see also *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009) (defining loss causation as negative “(1) ‘truthful’ information causing the decrease in price [was] related to an allegedly false, non-confirmatory positive statement made earlier and (2) that it is more probable than not that it was this negative statement, and not other unrelated negative statements, that caused a significant amount of the decline.”).

33. See *Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton I)*, 563 U.S. 804, 810 (2011); see also *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 106 (2d Cir. 2007) (noting that to show reliance, a plaintiff must demonstrate that “but for the claimed misrepresentations or omissions, the plaintiff would not have entered into the detrimental securities transaction” that led to the loss).

34. *Amgen*, 568 U.S. at 461 (“Reliance, we have explained, is an essential element of the § 10(b) private cause of action because proof of reliance ensures that there is a proper connection between a defendant’s misrepresentation and a plaintiff’s injury.”) (citing *Halliburton I*, 563 U.S. at 810); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008) (noting that proof of reliance ensures the “requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury . . .”).

35. *Halliburton II*, 573 U.S. at 267 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988)); *Halliburton I*, 563 U.S. at 810–11.

36. See *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153–54 (1972) (holding that in 10b-5 cases “involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery.”).

by the Supreme Court in *Basic v. Levinson* (the “Basic Presumption”).³⁷ The overwhelming number of class actions are premised on affirmative misrepresentations, in contrast to omissions, and thus proceed under the Basic Presumption of reliance.

The theory underlying the Basic Presumption is that an investor trading in an efficient market³⁸ presumptively relies on a misrepresentation because an efficient market incorporates all public, material information into a stock’s price.³⁹ Because the investor relies on the integrity of the market when he or she buys or sells stock, the investor indirectly relies on the misrepresentation.⁴⁰

In 2014, the Court reaffirmed the Basic Presumption in *Halliburton II*.⁴¹ In doing so, *Halliburton II* reaffirmed that the elements to invoke the Basic Presumption are: (1) the alleged misrepresentations were publicly known; (2) that they were material; (3) the stock traded in an efficient market;⁴² and (4) the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed.⁴³ Other Supreme Court decisions have held that securities fraud plaintiffs need not prove the materiality⁴⁴ nor loss causation elements at the class certification stage.⁴⁵

At the class certification stage of a securities class action, the principal issue contested is the reliance element.⁴⁶ At this stage, a court’s

37. See *Basic*, 485 U.S. at 243.

38. See *Amgen*, 568 U.S. at 490 (noting that an efficient market is one in which “the price of a company’s stock is determined by the available material information regarding the company and its business.”) (citing *Basic*, 485 U.S. at 241).

39. *Halliburton II*, 573 U.S. at 278 (quoting *Halliburton I*, 563 U.S. at 813); see also *Basic*, 485 U.S. at 247; *Amgen*, 568 U.S. at 462.

40. *Halliburton II*, 573 U.S. at 287–88 (quoting *Basic*, 485 U.S. at 247).

41. *Id.* at 274.

42. See *Amgen*, 568 U.S. at 461 (A market will be efficient if “the ‘market price of shares’ will ‘reflec[t] all publicly available information’”) (quoting *Basic*, 485 U.S. at 246).

43. *Halliburton II*, 573 U.S. at 277–78.

44. *Amgen*, 568 U.S. at 468 (“[P]laintiffs are not required to prove materiality at the class-certification stage . . .”).

45. *Halliburton I*, 563 U.S. 804, 807 (2011) (“The question presented in this case is whether securities fraud plaintiffs must also prove loss causation in order to obtain class certification. We hold that they need not.”).

46. See, e.g., *In re Virtus Inv. Partners, Inc. Sec. Litig.*, No. 15cv1249, 2017 WL 2062985, at *4 (S.D.N.Y. May 15, 2017) (noting that the class certification inquiry “often turns on the element of reliance.”) (quoting *Halliburton I*, 563 U.S. at 810); *Strougo v. Barclays PLC*, 312 F.R.D. 307, 312 n.17 (S.D.N.Y. 2016) (“Reliance is typically the only ground on which to challenge predominance . . .”).

inquiry is to determine whether “questions of law or fact common to class members predominate over any questions affecting only individual members.”⁴⁷ Most of the elements of a section 10(b) claim—including materiality, scienter, “in connection with” with the purchase or sale of securities, and damages—arise from a common nucleus of facts, which necessarily “predominate” under Rule 23(b).⁴⁸ Determining whether reliance predominates, however, requires a factual inquiry to determine whether the predicates for the presumption of reliance exist, such as market efficiency.⁴⁹ Because of this factual inquiry, the parties frequently litigate whether there are individualized factual issues that “predominate,” which would result in a denial of class certification.

If plaintiffs succeed in obtaining class certification, pursuant to Rule 23(c), the court must proceed to define the class period.⁵⁰ Courts have uniformly held that the class period begins on the date of the alleged misrepresentation and, with some exceptions, ends on the date that corrective information enters the market.⁵¹ The class period is restricted to this window because a plaintiff cannot rely on an alleged misrepresentation if the plaintiff’s relevant securities transaction was not executed in that window.⁵² Accordingly, plaintiffs who purchase after “the truth was revealed” are excluded from the class because they “could not be said to have acted in reliance on a fraud-tainted price.”⁵³

47. FED. R. CIV. P. 23(b)(3).

48. *Strougo*, 312 F.R.D. at 312 n.17; *see also Amgen*, 568 U.S. at 469; *Halliburton I*, 563 U.S. at 810.

49. *Strougo*, 312 F.R.D. at 314.

50. *See* FED. R. CIV. P. 23(c).

51. *See, e.g., Halliburton II*, 573 U.S. 258, 278 (2014) (noting that a plaintiff must show, among other things, that he “traded the stock between the time the misrepresentations were made and when the truth was revealed” and if he did buy or sell the stock “before the truth was revealed, then he could not be said to have acted in reliance on a fraud-tainted price.”); *Waggoner v. Barclays PLC*, 875 F.3d 79, 89 n.17 (2d Cir. 2017) (the class period “encompass[es] the time period between when [defendants] first made purportedly false statements . . . and the public disclosure of [defendants’] misstatements . . .”), *aff’g Strougo*, 312 F.R.D. 307; *Virtus*, 2017 WL 2062985, at *7 (“In the case of a securities fraud class action, courts are required to ‘cut off the class period’ on the date of a statement or event that ‘cure[s][] the market.’”) (quoting *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69, 97 (S.D.N.Y. 2015)).

52. *See Halliburton II*, 573 U.S. at 278 (“[I]f the plaintiff did not buy or sell the stock after the misrepresentation was made but before the truth was revealed, then he could not be said to have acted in reliance on a fraud-tainted price.”); *Amgen*, 568 U.S. at 472.

53. *Halliburton II*, 573 U.S. at 278.

D. PLACING THE *HALLIBURTON* DECISIONS IN CONTEXT

Class certification was thought to be a foregone conclusion if a complaint survived a motion to dismiss.⁵⁴ Indeed, members of the Supreme Court have criticized the Basic Presumption as being rebuttable in theory, but irrebuttable in practice.⁵⁵ Subsequently, in *Halliburton II*, the Supreme Court gave defendants the opportunity to present a new argument at class certification: rebutting the presumption of reliance by showing a lack of price impact on the allegedly affected stock.⁵⁶ Price impact is a shorthand reference to “whether the alleged misrepresentations affected the market price.”⁵⁷ Price impact is distinct from the loss causation element of a 10(b) claim, which looks at the cause of stock price drop.⁵⁸

The *Halliburton* saga arose from claims by plaintiff-investors of Halliburton, who alleged that Halliburton executives misrepresented the scope of the company’s potential liability in asbestos litigation, its expected revenue from certain construction contracts, and the benefits of its merger with another company.⁵⁹ After the complaint survived a motion to dismiss, the plaintiffs moved to certify a putative class of investors.⁶⁰ Halliburton obtained a denial of class certification at the district and circuit court levels by arguing that the plaintiffs failed to satisfy the loss causation element.⁶¹

54. See Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 BUS. LAW. 307, 388 (2014) (noting there have only been six cases rebutting the Basic Presumption out of the thousands 10b-5 cases brought since the inception of the Basic Presumption).

55. *Halliburton II*, 573 U.S. at 288 (Thomas, J., concurring) (“Basic’s presumption that investors rely on the integrity of the market price is virtually irrebuttable in practice . . .”).

56. *Id.* at 284 (“[D]efendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock.”).

57. *Halliburton I*, 563 U.S. 804, 814 (2011).

58. While price impact refers to whether the stock moved in relation to the misrepresentation and curative information, loss causation refers to the causal connection between the material misrepresentation and the plaintiffs’ economic loss. See *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009); *Halliburton I*, 563 U.S. at 808 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005)).

59. *Halliburton I*, 563 U.S. at 807–08.

60. *Id.* at 808.

61. *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152-M, 2008 WL 4791492, at *12 (N.D. Tex. Nov. 4, 2008), *aff’d*, 597 F.3d 330 (5th Cir. 2010). At the time that *Halliburton I* was rendered in 2011, the Fifth Circuit, clashed with other circuits, by requiring plaintiffs to prove loss causation at class

In its 2011 decision in *Halliburton I*, the Supreme Court reversed the Fifth Circuit, holding that a putative plaintiff class need not prove loss causation at the class certification stage.⁶² On remand, Halliburton argued that class certification was inappropriate because the evidence they had previously introduced to disprove loss causation also showed that none of their alleged misrepresentations had affected the company's stock price.⁶³ Halliburton argued that if there was no movement in the stock price, then investors could not have relied on the alleged misstatements.⁶⁴ Nevertheless, the district and circuit courts rejected Halliburton's arguments and granted and affirmed class certification.⁶⁵

In its 2014 decision in *Halliburton II*, the Supreme Court again reversed and remanded.⁶⁶ In *Halliburton II*, the Court rejected Halliburton's primary argument: to overrule the Basic Presumption.⁶⁷ The Court, however, agreed with Halliburton's backup argument that it should be allowed to defeat the presumption of reliance at the class certification stage by arguing that the alleged misrepresentation did not affect the stock's price.⁶⁸ The Court agreed with this argument, reasoning that the Basic Presumption would "collapse" in the absence of price impact.⁶⁹ This is because the theory "underlying the [Basic] [P]resumption is 'that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction.'"⁷⁰ If there was no movement in the stock price, then there is no grounding that a plaintiff

certification. See e.g., *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 184–85 (S.D.N.Y. 2008); *In re Metro. Secs. Litig.*, No. CV-04-25-FVS, 2008 U.S. Dist. LEXIS 100325, at *16 (E.D. Wash. Nov. 25, 2008) (noting the Fifth Circuit's position was "controversial" and treated with "skepticism"); *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010) ("Unlike the fifth circuit, we do not understand *Basic* to license each court of appeals to set up its own criteria for certification of securities class actions or to 'tighten' Rule 23's requirements.") (quoting *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007)).

62. *Halliburton I*, 563 U.S. at 813 (noting it was error "requiring [plaintiffs] to show loss causation as a condition of obtaining class certification" because the issue of loss causation was not relevant to the principle inquiry at class certification of showing whether common questions of law and fact predominate throughout the class).

63. *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, No. 3:02–CV–1152–M, 2012 WL 565997 (N.D. Tex. Jan. 27, 2012); see also *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 255–56 (N.D. Tex. 2015).

64. *Archdiocese of Milwaukee Supporting Fund, Inc.*, 2012 WL 565997; see also *Erica P. John Fund, Inc.*, 309 F.R.D. at 255–56.

65. *Archdiocese of Milwaukee Supporting Fund, Inc.*, 2012 WL 565997, at *3.

66. *Halliburton II*, 573 U.S. 258, 284 (2014).

67. *Id.* at 274–75.

68. *Id.* at 279–80.

69. *Id.* at 278.

70. *Id.* (quoting *Halliburton I*, 563 U.S. 804, 813 (2011)).

indirectly relied on the misstatement through his or her reliance on the integrity of the market price.⁷¹ In other words, the lack of “price impact” precludes a plaintiff from arguing that he or she indirectly relied on the misrepresentation because an efficient market accounts for all material public information.⁷² The effect of *Halliburton II* is that defendants in a securities fraud class action are permitted to present evidence of a lack of price impact in opposition to a motion for class certification, which was not previously a given option.

II. HAS *HALLIBURTON II* CHANGED THE OUTCOME AT CLASS CERTIFICATION?

Before *Halliburton II* was decided, corporate defendants had unfavorable odds at obtaining a ruling denying class certification.⁷³ Defense-oriented commentators believed *Halliburton II*’s lack-of-price-impact argument would help change that trend, even if it was not the “sea-changing” decision that they had wanted.⁷⁴ Five years have now passed since *Halliburton II*. In order to understand and explain the effect(s) of *Halliburton II*, this Article engages in an empirical analysis of all 10(b) class certification decisions made four years before and after *Halliburton II*.⁷⁵ It then inquires into whether *Halliburton II* affected the landscape of class certification decisions.

71. *Halliburton II*, 573 U.S. at 278 (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 473 (2013)).

72. *See id.* at 279.

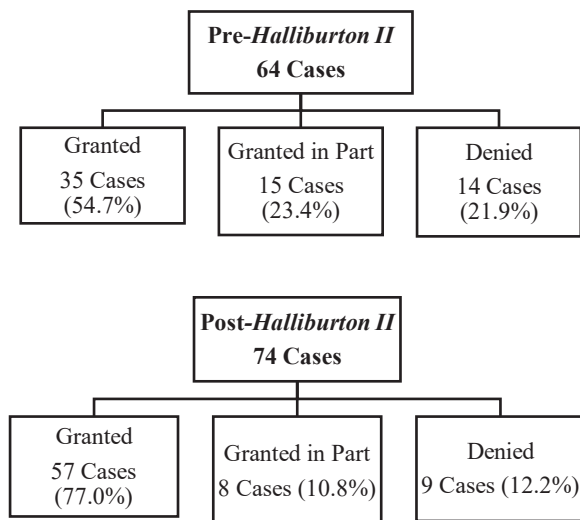
73. *See supra* Section II.C.

74. Peter J. Romatowski, N. Scott Fletcher, et al., *Supreme Court Decision in Halliburton II Affords Welcome Tool to Defendants*, JONES DAY (June 2014), (<http://www.jonesday.com/supreme-court-decision-in-halliburton-ii-affords-welcome-tool-to-defendants-06-25-2014/>) [<https://perma.cc/2PQB-ENL4>] (“While not a sea change in the law, *Halliburton II* should make it more difficult for plaintiffs to obtain class certification and the settlement leverage that comes with it. The decision adds a valuable tool for the defense of securities fraud class action cases.”); *see also* Todd G. Cosenza, Robert A. Gomez, *Halliburton II: Fraud-on-the-Market Presumption Survives but Supreme Court Makes it Easier to Rebut Presumption*, WILLKIE, FARR, & GALLAGHER LLP (June 24, 2014), (https://www.willkie.com/~media/Files/Publications/2014/06/Halliburton_II_Fraud_on_the_Market_Presumption_Survives.pdf) [<https://perma.cc/65LN-UNR7>] (“Although not the judicial earthquake that some were expecting, the holding in *Halliburton II* deals a serious blow to securities fraud class action plaintiffs. It effectively ensures that evidence of price impact before class certification will become a major battleground in securities fraud class action cases.”).

75. These cases were gathered as of September 4, 2018, by pulling all cases on Westlaw, Lexis, and Bloomberg that hit on the search: “class /2 cert!” (i.e. all cases that include the word “class” within two words of any derivation of the word “cert” like

A. WIN-LOSS NUMBERS AT THE DISTRICT COURT LEVEL

Decisions made at the district court level evidence that *Halliburton II* has not helped defendants.

Decision Tree 1: Comparing Pre- and Post-*Halliburton II* Outcomes

As seen in Decision Tree 1, there were a total of sixty-four class certification decisions in the four years prior to *Halliburton II*. Of these, defendants obtained a denial in full in only fourteen cases (21.9%) and a denial in part in fifteen cases (23.4%), while plaintiffs obtained a grant of

“certify,” “certified,” “certification,” etc.). For the post-*Halliburton II* cases, I could not isolate the relevant cases by searching for cases that cited to *Halliburton II* because there are certain relevant decisions that do not cite to *Halliburton II*. See, e.g., *In re Virtus Inv. Partners Inc.*, No. 15CV8262, 2017 WL 2062986, at *1 (S.D.N.Y. May 15, 2017); *City of Pontiac Gen. Emps.’ Ret. Sys. v. Wal-Mart Stores, Inc.*, No. 5:12-CV-5162, 2016 WL 5400373, at *7 (W.D. Ark. Sept. 20, 2016); *Takiguchi v. MRI Int’l, Inc.*, No. 213CV01183HDMVCF, 2016 WL 1091090, at *1 (D. Nev. Mar. 21, 2016); *Kaplan v. S.A.C. Capital Advisors, L.P.*, 311 F.R.D. 373, 383 (S.D.N.Y. 2015). Excluded from the data are cases that were: (1) non-10(b) related class certification decisions; (2) 10(b) related decisions, but non-class certification related; (3) class certification decisions in connection with a settlement (excluded because neither party contested the class certification decision); (4) cases brought by government regulators (excluded because government enforcement suits do not require regulator to prove reliance); (5) decisions by magistrates which were adopted in full by the district courts; (6) state court decisions; (7) class certification denied as moot because case was dismissed; (8) supreme court decisions; and (9) 10(b) claims previously dismissed or withdrawn.

class certification in thirty-five cases (54.7%).⁷⁶ Post-*Halliburton II*, there were seventy-four district court class certification decisions. Of these, defendants obtained a denial in only nine cases (12.2%) and a denial in part in eight cases (10.8%), while plaintiffs obtained a grant of class certification in fifty-seven cases (77.0%).⁷⁷ In sum, post-*Halliburton II* outcomes show that plaintiffs obtained outright grants of class certification more often (77.0% versus 54.7%). Conversely, defendants obtained outright denials less frequently (12.2% versus 21.9%). These statistics suggest that far from making the class certification stage less hostile to defendants, class certification has become much more hostile to defendants.

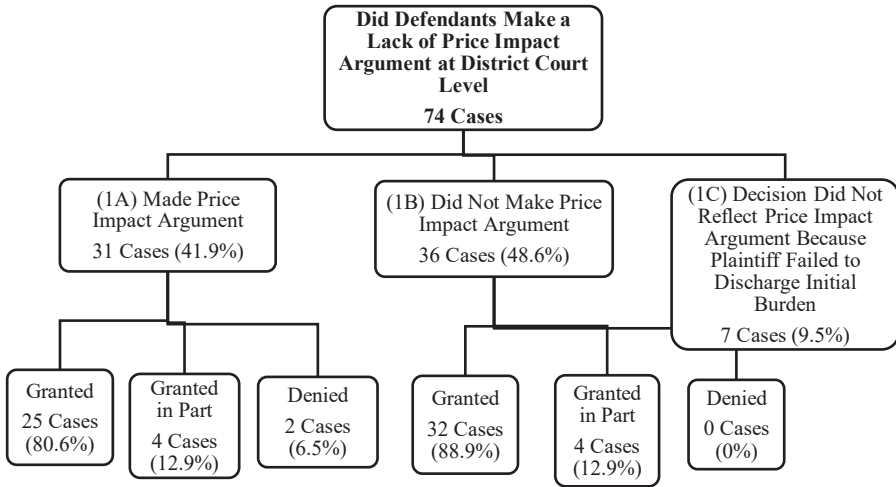
B. WIN-LOSS NUMBERS WHEN DEFENDANTS CHALLENGE PRICE IMPACT

Decision Tree 2 below surveys cases where defendants made *Halliburton II*'s price impact argument and compares the results to cases where the argument was not made.

76. Although it therefore appears that the odds of plaintiffs obtaining a complete “win” are only slightly better than a fifty-fifty coinflip, this obscures two important facts that actually inflate defendants’ odds of obtaining a favorable result. First, of the fourteen full denials, only one involved a rebuttal of the Basic Presumption, while the other thirteen involved plaintiffs being unable to discharge their initial burden to invoke the *Basic* or *Affiliated Ute* presumptions. Second, of the fifteen cases in which class certification was granted in part, only four of the fifteen (26.7%) resulted in a significantly favorable decision for defendants—where the class period was significantly truncated by a minimum of 30%. Thus, the adjusted numbers indicate that the pre-*Halliburton II* courts were extremely favorable toward plaintiffs.

77. While defendants obtained denials in a mere nine cases (or 12.2% of the time), even this figure inflates defendants’ chance of defeating the Basic Presumption. Of the nine denials, in only two cases did defendants successfully rebut the Basic Presumption. In the other seven cases, plaintiffs failed to discharge their initial burden, such as showing an efficient market.

Decision Tree 2: Making the Lack of Price Impact Argument



Of all seventy-four post-*Halliburton II* class certification decisions, defendants challenged price impact in thirty-one cases (41.9%) and did not challenge in another thirty-six (48.6%). Looking at the outcomes in the third tier of the decision tree, the numbers show a small and ultimately non-meaningful level of success versus not making the price impact argument. When defendants challenged price impact, class certification was denied 6.5% of the time,⁷⁸ versus 0% when defendants did not challenge price impact. Further, if defendants made the price impact argument, then the rate at which certification was granted was 80.6%, versus 88.9% when defendants did not make the argument.⁷⁹

Decision Tree 2 demonstrates that defendants have not fared better or worse when they made the lack-of-price-impact argument as opposed to cases when they did not. While defendants have fared six to seven percentage points better in obtaining an outright or partial denial of class certification when they raise the lack-of-price-impact argument, these results are not material because defendants still lost—meaning class certification was granted outright—over 80% of the time.

78. Two cases in which class certification was denied divided by thirty-six cases where defendants challenged price impact equals 6.5%.

79. Dividing the twenty-five cases in which class certification was granted where defendants made a lack-of-price-impact argument over the thirty-one total cases where a price impact argument was made equals 80.6%. Likewise, dividing the thirty-two cases where class certification was granted in cases where defendants did not challenge price impact by the thirty-six cases where price impact was not challenged equals 88.9%.

C. RESULTS AT THE APPELLATE COURT LEVEL

To obtain a favorable result on interlocutory appeal, defendants need to overcome several hurdles. Pursuant to Rule 23(f), defendants may file an interlocutory appeal of a decision granting class certification.⁸⁰ However, this appeal is a matter of the circuit court's discretion, not as a matter of right.⁸¹ Accordingly, defendants need to follow a procedure akin to obtaining *certiorari* in the Supreme Court by filing for and obtaining leave to appeal.⁸² Once defendants receive leave to appeal, they must convince the appellate court to rule in their favor on the merits. In the interim, defendants must avoid succumbing to the pressure of settling the case while the appeal is ongoing.⁸³

Decision Tree 3 illustrates the choices, possible outcomes, and the actual post-*Halliburton II* results.⁸⁴

80. FED. R. CIV. P. 23(f) (If a petition for permission to appeal is filed “[a] court of appeals may permit an appeal from an order granting or denying class-action certification . . .”).

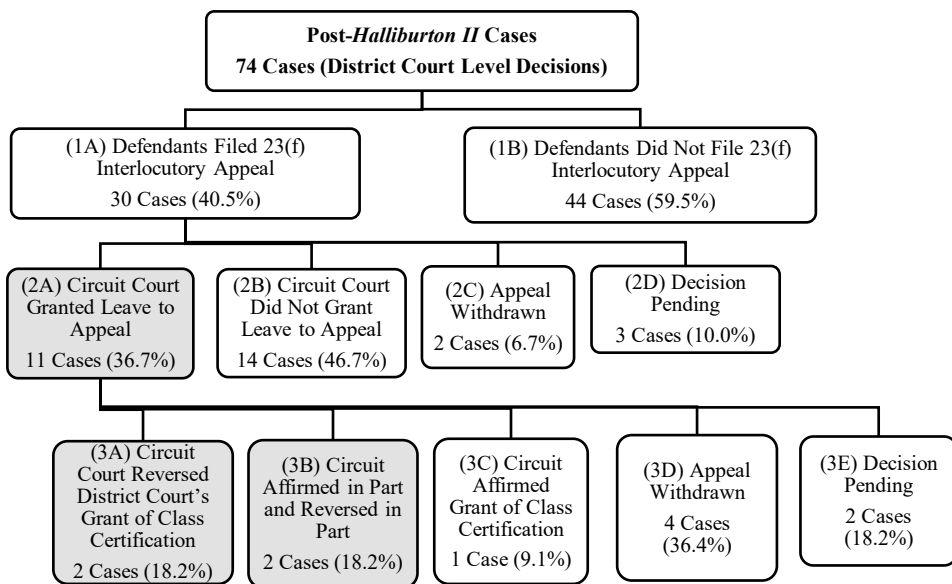
81. See *id.* (“A court of appeals may permit an appeal . . .”).

82. See FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment (“The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for *certiorari*.”).

83. See *id.* (recognizing that “an order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”); see also *supra* Section II.A.

84. Likely due to the federal courts' hostility to defense arguments, there were only seven pre-*Halliburton II* appellate appeals, which are disregarded as statistically unreliable due to the *de minimis* number of decisions because a single case could significantly skew the data. While all such cases have been omitted from this Article, the data regarding these cases is available upon request from the author.

Decision Tree 3: Seeking 23(f) Interlocutory Appeal



For defendants to “win” by obtaining a denial or denial in part, once they decide to appeal (1A), they need to get to box 2A and then to box 3A (the ideal outcome) or 3B (a partial victory). The shaded boxes represent the decisions that defendants need to obtain to “win” on a Rule 23(f) appeal.

At first glance, it does not appear that defendants have a high chance of achieving a full or partial success. Out of seventy-four total cases where there were class certification decisions, only four resulted in a 3A or 3B outcome reversal in full or in part, translating to a combined 5.4% full and/or partial success rate.⁸⁵ On further review, the probability of success, however, is substantially higher than this, as defendants only chose to file 23(f) appeals interlocutory appeals of class certification decisions (1A) in thirty cases, out of the total seventy-four cases surveyed (40.5%), and in only twenty-five cases did a circuit court grant or deny leave to appeal (2A + 2B). Adjusting for this, the four cases in which a court denied

85. The underlying formula for 3A and for 3B is two cases divided by seventy-four total cases, equaling 2.7% each, or 5.4% combined. Likely due to the federal courts’ hostility to defense arguments, there were only seven pre-*Halliburton II* appellate appeals, which are disregarded as statistically unreliable due to the low number of decisions because a single case could significantly skew the data. While all such cases have been omitted from this Article, the data regarding these cases is available upon request from the author.

certification in full (3A) or in part (3B) versus the combined twenty-five cases in which a court made a ruling on appeal represents a defense success rate of 16.0%. While this is much better than 5.4%, it still results in an 84.0% rate where class certification was granted, at least in part.

Thus, defendant appeals have not had much success on appellate review. No matter how one looks at the metrics, defendants continue to face an uphill battle in preventing certification post-*Halliburton II*.

III. WHY *HALLIBURTON II* HAS NOT CHANGED THE STATE OF THE GAME

While *Halliburton II* allowed defendants to make the lack-of-price-impact argument, it has not changed the state of the game because the Court did not specify how defendants should make the lack-of-price-impact argument, nor defendants' burden of proof in making the lack-of-price-impact argument.

The post-*Halliburton II* courts overwhelming were willing to consider lack of price impact only at the time that the truth of a purported misrepresentation entered the market ("back-end"), to the exclusion of price impact at the time of the misrepresentation ("front-end").⁸⁶ Looking only to lack of back-end price impact has created a paradigm that has made it difficult for most defendants to prove lack of price impact. In the vast majority of cases, there *was* back-end price movement since plaintiffs plead class period end dates when stock prices dropped.⁸⁷ Even if defendants can demonstrate that the underlying drivers were unrelated to the allegedly negative information,⁸⁸ courts will not consider what caused the stock to move because of *Halliburton I*, nor will they accept alternative back-end dates suggested by defendants, for reasons discussed below. This usually proves fatal to defendants' efforts to prevent a class from being certified.

The second problem defendants face is that *Halliburton II* did not specify a defendant's burden of proof in making the lack-of-price-impact argument. The post-*Halliburton II* courts have required defendants to satisfy both burdens of persuasion and production in order to make a satisfactory showing of lack of price impact. As discussed in detail below,

86. See *infra* Section IV.A.

87. See *id.*

88. See generally *Halliburton I*, 563 U.S. 804 (2011).

the burden of proof has a correlative effect on the post-*Halliburton II* courts' class certification decisions.

A. THE MAJORITY OF THE POST-*HALLIBURTON II* COURTS ONLY
CONSIDER BACK-END PRICE IMPACT TO THE EXCLUSION
OF FRONT-END PRICE IMPACT

The post-*Halliburton II* courts have required defendants to show a lack of price impact on the back-end date, which is a standard that many defendants cannot satisfy. Courts have arrived at this paradigm by both rejecting front-end price impact as unreliable, under the price maintenance theory, and refusing to consider alternative dates for the back-end date.

1. *The Post-Halliburton II Courts Have Applied the Price Maintenance Theory to Foreclose Reliance on Front-End Price Impact*

The majority of the post-*Halliburton II* courts have accepted the price maintenance theory, under which, the lack of upward move on the date of the alleged fraud is unreliable because the alleged fraud could be masking a stock drop, resulting in a net lack of price impact.⁸⁹ In other words, the price maintenance theory posits that misrepresentations may cause stocks to “maintain” their artificially inflated price where there otherwise would have been demonstrable price impact.⁹⁰ Thus, it is

89. See, e.g., *In re HealthSouth Corp. Sec. Litig.*, 257 F.R.D. 260, 282–83 (N.D. Ala. 2009) (rejecting defendants' attempt to rebut the Basic Presumption because “[e]ven without a demonstrated increase in share price directly related to the fraudulent statements, Plaintiffs can travel on the fraud-on-the-market theory by showing that the negative truthful information that caused the share price to drop was related to the prior false positive statements.”).

90. See *In re Vivendi Universal, S.A. Sec. Litig.*, 838 F.3d 223, 258 (2d Cir. 2016) (holding that “a statement may cause inflation not simply by adding it to a stock, but by maintaining it.”); see also *Hatamian v. Advanced Micro Devices, Inc.*, No. 14-cv-00226 YGR, 2016 WL 1042502, at *7 (N.D. Cal. Mar. 16, 2016) (“It is also possible that ‘a misstatement could serve to maintain the stock price at an artificially inflated level without also causing the price to increase further.’”) (quoting *City of Livonia Emps.’ Ret. Sys. v. Wyeth*, 284 F.R.D. 173, 182 (S.D.N.Y. 2012)); *In re Pfizer Inc. Sec. Litig.*, 936 F. Supp. 2d 252, 264 (S.D.N.Y. 2013) (This was the first case within the Second Circuit’s jurisdiction addressing the price maintenance theory, holding that “a misstatement may cause inflation simply by maintaining existing market expectations . . .”) (quoting *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 561–62 (S.D.N.Y. 2011)).

insufficient for defendants to show lack of front-end price impact, rather they must show the absence of *back-end* price impact.⁹¹

Courts are currently split on whether to adopt the price maintenance theory.⁹² On one hand, the Second,⁹³ Seventh,⁹⁴ and Eleventh Circuits⁹⁵ have adopted the price maintenance theory. On the other hand, the Fifth (arguably)⁹⁶ and Eighth⁹⁷ Circuits, as well as three district courts in the Sixth Circuit,⁹⁸ and a district court in the Ninth Circuit,⁹⁹ have rejected application of the price maintenance theory, holding that lack of front-end price impact is sufficient to rebut the Basic Presumption.

The courts that have adopted the price maintenance theory have principally relied on two policy reasons. First, “[d]efendants who commit fraud to prop up an already inflated stock price do not get an automatic free pass under the securities laws.”¹⁰⁰ Second, “once a company speaks

91. See *id.* (“Defendants essentially invite the Court to focus exclusively on price impact at the time of a misrepresentation, ignoring price impact at the time of a corrective disclosure. Price impact in securities fraud cases is not measured solely by price increase on the date of a misstatement; it can be quantified by decline in price when the truth is revealed.”).

92. See, e.g., *Vivendi*, 838 F.3d at 259; *Glickenhau & Co. v. Household Int’l, Inc.*, 787 F.3d 408, 417–18 (7th Cir. 2015); *FindWhat Inv’r Grp. v. FindWhat.com*, 658 F.3d 1282, 1310 (11th Cir. 2011); *Greenberg v. Crossroads Sys.*, 364 F.3d 657, 665 (5th Cir. 2004).

93. *Vivendi*, 838 F.3d at 259.

94. *Glickenhau*, 787 F.3d at 417–18.

95. *FindWhat*, 658 F.3d at 1310.

96. See, e.g., *Greenberg*, 364 F.3d at 665. *Greenberg* is a pre-*Halliburton* appeal affirming in part the dismissal of 10(b) complaint at summary judgment for failure to plead loss causation and reliance. *Greenberg* requires plaintiffs to demonstrate that a “positive statement actually affected a stock’s price . . . Without such a showing there is no basis for presuming reliance by the plaintiffs.” *Id.*; see also Marc D. Powers, Mark A. Kornfeld, et al., *2016 Year-End Securities Litigation and Enforcement Highlights*, BAKERHOSTETLER (Jan. 2017), <https://www.bakerlaw.com/webfiles/Litigation/2017/Briefs/2016-Year-End-Securities-Litigation-and-Enforcement-Highlights.pdf> [<https://perma.cc/X8DX-TKZ7>].

97. See, e.g., *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782–84 (8th Cir. 2016).

98. See, e.g., *Burges v. BancorpSouth, Inc.*, No. 3:14-cv-1564, 2017 WL 2772122, at *9 (M.D. Tenn. June 26, 2017); *Willis v. Big Lots, Inc.*, 242 F. Supp. 3d 634, 653 (S.D. Ohio 2017); *Kasper v. AAC Holdings, Inc.*, No. 15-cv-00923, 2017 WL 3008510, at *7 (M.D. Tenn. July 14, 2017).

99. See, e.g., *In re Finisar Corp. Sec. Litig.*, No. 5:11-cv-01252, 2017 WL 6026244, at *7 (N.D. Cal. Dec. 5, 2017).

100. See *In re Vivendi Universal, S.A. Sec. Litig.*, 838 F.3d 223, 259 (2d Cir. 2016); *FindWhat*, 658 F.3d at 1316 (“There is no reason to draw any legal distinction between fraudulent statements that wrongfully prolong the presence of inflation in a stock price and fraudulent statements that initially introduce that inflation.”).

on an issue or topic, there is a duty to tell the whole truth.”¹⁰¹ For these reasons, there is no distinction between misrepresentations that cause a stock price to rise and those that prevent it from falling.¹⁰²

The courts that have rejected the price maintenance theory have done so on the ground that a showing of lack of front-end price impact satisfies *Basic*’s directive that defendants are allowed to rebut the Basic Presumption through “[a]ny showing that severs the link between the alleged misrepresentation and either the price received or paid by the plaintiff, or his decision to trade at a fair market price.”¹⁰³ For example, in *Best Buy*, the Eighth Circuit rejected the application of the price maintenance theory because “that theory provided no evidence that refuted defendants’ overwhelming evidence of no price impact.”¹⁰⁴ Moreover, in *Finisar*, the district court held that defendants were free to make “any showing that severs the link” between the misrepresentation and the stock price, which the defendant indeed did by showing lack of front-end price impact.¹⁰⁵

The widespread adoption of the price maintenance theory has had a significant impact on the outcome of class certification decisions. Of the seventy-four post-*Halliburton II* district court class certification decisions, defendants challenged front-end price impact in thirty-one instances (41.9%). However, they only succeeded in obtaining a denial of class certification in two instances (6.5% of the thirty-one cases).

101. See *Vivendi*, 838 F.3d at 258–59 (observing that if defendants were able to escape liability when they perpetuate a stock price inflation that did not originate from fraudulent misstatements, then companies would have every incentive to maintain inflation that already exists in their stock price by making false or misleading statements).

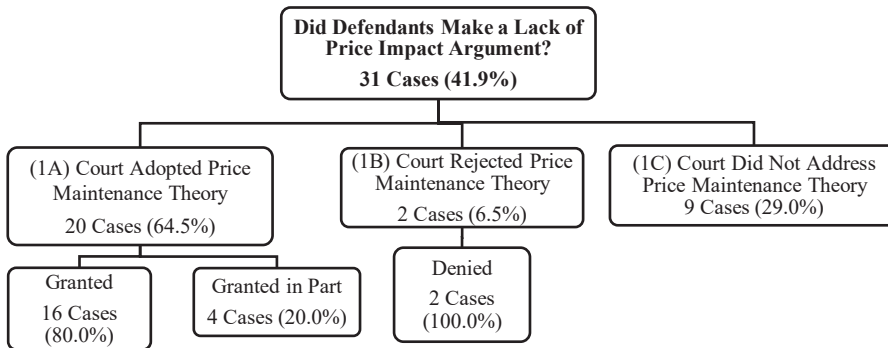
102. *Glickenhau & Co. v. Household Int’l, Inc.*, 787 F.3d 408, 418 (7th Cir. 2015).

103. *Finisar*, 2017 WL 6026244, at *6 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988)).

104. *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 783 (8th Cir. 2016).

105. *Finisar*, 2017 WL 6026244, at *7, *9.

Decision Tree 4: Price Impact Argument



Decision Tree 4 shows the results when defendants make a price impact argument and when courts adopt the price maintenance theory versus when they do not (1A versus 1B). Procedurally, two things must occur in order for courts to address the price maintenance theory: the defendant must make the lack of price impact argument as a threshold matter, and the court must then decide whether it will apply the price maintenance theory. Predictably, when defendants make the lack of price impact argument and when the courts adopted the price maintenance theory, plaintiffs fared very well. Conversely, when courts refused to adopt the theory, defendants enjoyed greater success.¹⁰⁶

Of the thirty-one cases where defendants made a price impact argument and when the courts adopted the price maintenance theory (1A), plaintiffs overwhelmingly succeeded, obtaining an outright grant of class certification in sixteen cases (80.0%), and a partial grant in four cases (20.0%). Not surprisingly, defendants did not obtain a single outright denial when courts adopted the theory. Yet, in the rare two cases where the court rejected the price maintenance theory (1B), defendants obtained an outright denial in both cases (100.0%).¹⁰⁷

These numbers support the inference that a post-*Halliburton II* court's adoption of the price maintenance theory is likely to be outcome determinative in favor of granting class certification. The reason why is that when courts adopt the price maintenance theory, it forces defendants to show a lack of back-end price impact.¹⁰⁸ The immediate problem with this is that plaintiffs invariably choose back-end dates that show negative

106. This is seen in tiers 2 and 3 of Decision Tree 4.

107. See tiers 2 and 3 of Decision Tree 4.

108. *Halliburton II*, 573 U.S. 258, 296 (2014).

price impact, so defendants are forced to play ‘catch-up’ by arguing that the price decline was due to unrelated factors.

Even if defendants believe they can make credible arguments that the price impact was caused by another factor aside from the alleged untruth, they generally are unable to disconnect the price movement from the fraud because that would force defendants to make an impermissible loss causation argument that *Halliburton I* prohibits at the class certification stage.¹⁰⁹ Thus, in some instances, it is impossible to show lack of back-end price impact and thus, showing lack of front-end price impact is the only other option.

Forcing a defendant to show back-end price impact is difficult, if not impossible. For example, in *Burges v. BancorpSouth, Inc.*, on remand from the Eleventh Circuit to give a more “rigorous analysis” of defendants’ lack-of-price-impact argument, the district court rejected defendants’ argument, applying the price maintenance theory, thus foreclosing an argument based on front-end price impact.¹¹⁰ The district court proceeded to find the presence of back-end price impact after the corrective disclosure entered the market.¹¹¹ The Court rejected the defendants’ argument that any decline was attributable to “other factors besides the corrective disclosure,” citing to *Halliburton I*.¹¹² *BancorpSouth* thus provides an example of a larger trend in which courts grant class certification where defendants were able to show lack of front-end price impact, but could not show lack of back-end price impact. *BancorpSouth* is not an anomaly and reflects the scenario and outcome for many similarly situated defendants.¹¹³

In sum, if courts adopt the price maintenance theory and there is a negative price impact on the back-end—even if unconnected to a

109. *Halliburton I*, 563 U.S. 804, 807 (2011) (“The question presented in this case is whether securities fraud plaintiffs must also prove loss causation in order to obtain class certification. We hold that they need not.”).

110. *Burges v. BancorpSouth, Inc.*, No. 3:14-cv-1564, 2017 WL 2772122, at *9–10 (M.D. Tenn. June 26, 2017) (“So the fact that there was no stock price increase when the statements were made does not suggest a lack of price impact.”).

111. *Id.* at *10.

112. *Id.*

113. *See, e.g.*, *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69, 95–96 (S.D.N.Y. 2015) (rejecting defendants’ lack of front-end price impact argument and rejecting back-end price impact argument because they impermissibly dealt with loss causation); *Willis v. Big Lots, Inc.*, 242 F. Supp. 3d 634, 657, 659 (S.D. Ohio 2017) (rejecting defendants’ lack of front-end price impact argument due to price maintenance theory, and defendants conceded there was price impact on the back-end); *McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415 (S.D.N.Y. 2014).

defendant's actions—the price maintenance theory will likely be the death knell for a price impact defense.

2. *The Post-Halliburton II Courts Refuse to Consider a Different Back-End Date for the Close of the Class Period Due to Amgen*

In addition to the post-*Halliburton II* courts' rejection of front-end price impact, the post-*Halliburton II* courts have rejected defendants' alternative argument to move up the class period back-end date because the truth was already known to the market at the back-end date pled by plaintiffs.

The underpinning of this argument is that because the truth was already known to the market at the back-end date that plaintiffs pled, the back-end date should be moved up to the date when the truth entered the market ("variation on the truth-on-the-market defense").¹¹⁴ If courts accept the variation on the truth-on-the-market defense, then courts would be looking at back-end price impact on a different date where there may be a lack of price impact.

The principal hurdle is proving that the argument is applicable at class certification due to the Supreme Court's holding in *Amgen* that plaintiffs may not invoke the classic truth-on-the-market defense at class certification.¹¹⁵ The truth-on-the-market defense holds that a misrepresentation or omission is immaterial as a matter of law if the truth of the matter was already known to the market at the time of the misrepresentation.¹¹⁶ *Amgen* held that at class certification, plaintiffs do not need to satisfy the materiality element of a section 10(b) claim because materiality necessarily predominates under Rule 23 as it is based on an objective standard.¹¹⁷ Because of *Amgen*, defendants who raise a variation on the truth-on-the-market defense face the threshold hurdle of

114. See *infra* notes 146–61 (discussing the variation on the truth-on-the-market defense).

115. See *Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988) ("Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance. For example, if petitioners could show that the 'market makers' were privy to the truth . . ."); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 482 (2013) (approving of circuit court's characterization of the truth-on-the-market defense as a "method of refuting an alleged misrepresentation's materiality.").

116. *Amgen*, 568 U.S. at 481–82.

117. *Id.* at 459, 469 (quoting FED. R. CIV. P. 23(b)(3)) (at class certification, plaintiffs must show that "common questions *predominate* over any questions affecting only individual [class] members.") (emphasis added).

convincing a court that the argument is applicable at class certification and that the argument ought to prevail on the merits.¹¹⁸

The variation on the truth-on-the-market defense is different from the classic version because it does not outright rebut the Basic Presumption like its classical counterpart. Rather the variation rebuts the Basic Presumption as of a certain time, such that it makes “continued reliance on [the fraudulent misstatements] unreasonable.”¹¹⁹ At the heart of the argument, defendants do not assert that the misstatements were immaterial as a matter of law.¹²⁰ Rather, the argument asserts that a statement becomes immaterial as of a certain time—i.e. after the corrective information enters the market.¹²¹ Thus, the argument seeks to change the end date of the class to an earlier date when the truth purportedly came out.¹²²

Decision Tree 5 summarizes the hurdles that defendants need to overcome to successfully shorten the class period. To succeed, defendants need to assert the modified truth on the market defense (1A); they must then show that the argument is applicable at class certification (2A); and finally, they must convince the court on the merits (3A).

118. *Id.* at 481 (approving of circuit court’s characterization of the “truth-on-the-market defense” as a “method of refuting an alleged misrepresentation’s materiality”) (citation and emphasis omitted); *see also* *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir. 2000) (“A defendant may rebut the presumption that its misrepresentations have affected the market price of its stock by showing that the truth of the matter was already known.”).

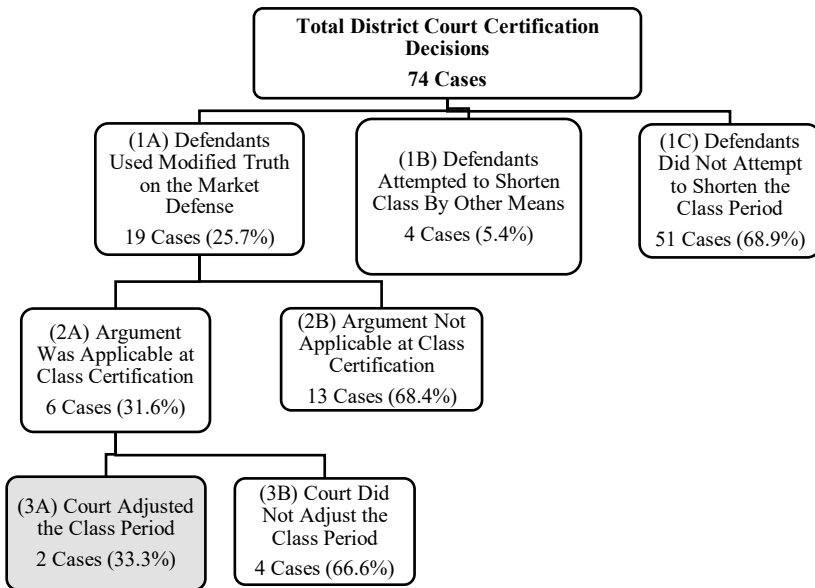
119. *Hayes v. MagnaChip Semiconductor Corp.*, No. 14-cv-01160-JST, 2016 WL 7406418, at *8 (N.D. Cal. Dec. 22, 2016).

120. *See, e.g., Longman v. Food Lion, Inc.*, 197 F.3d 675, 685 (4th Cir. 1999) (alleging that defendants made misstatements and omissions of material fact after ABC’s Primetime Live reported widespread unsanitary practices and labor law violations in grocery stores owned by defendants, which plaintiffs alleged constituted a corrective disclosure of the previously unknown fraud. The Fourth Circuit affirmed the dismissal of plaintiffs’ claims because the market knew the truth earlier in time when the workers’ union publicly announced that it had filed a complaint with the Department of Labor and announcing the substance of their labor and sanitary condition claims. Thus, the Primetime Live broadcast “added nothing to inform the market further” and instead “simply repeated earlier charges” known to the public).

121. *See, e.g., Hayes*, 2016 WL 7406418, at *7–9 (*Amgen* did not bar the court from considering the date of corrective disclosure at class certification because that argument does challenge “that the original misrepresentations were immaterial . . .”).

122. *See W. Va. Pipe Trades Health & Welfare Fund v. Medtronic, Inc.*, 325 F.R.D. 280, 291 (D. Minn. 2018).

Decision Tree 5: Shortening the Class Period



How successful has the variation on the truth-on-the-market defense been? Out of seventy-four total district court class certification decisions, defendants attempted to employ the variation on truth-on-the-market (1A) in nineteen cases (25.7%),¹²³ and tried shortening via alternative methods (i.e., shortened from the front-end) (1B) in four cases (5.4%). On the other hand, defendants did not try to shorten the class (1C) in fifty-one cases or 68.9% of the total cases.

When defendants invoked the modified truth-on-the-market defense, the results have been favorable to plaintiffs. Out of nineteen cases where defendants tried to shorten the class period (1A), only six cases (31.6%) have held the argument is applicable at class certification (2A), while thirteen (68.4%) have held it is not applicable (2B). If courts hold that a defendants' argument is applicable, then it is a one in three chance whether defendants will be able to change the end date of the class, as the court shortened the class period in two cases (3A) and did not in four other cases (3B).

123. While nineteen cases employed the variation on the truth-on-the-market defense, an additional four cases attempted to shorten the class through other means, bringing the total number of cases in which defendants attempted to shorten the class to twenty-three cases.

Thus, defendants who try to shorten the class period have been generally unsuccessful in demonstrating the applicability of their argument and are effectively stuck with the end date as plaintiffs alleged.

Because defendants cannot move the class end date and cannot prove lack of price impact on the original class end date, the courts have created a paradigm where defendants cannot show lack of price impact—even though defendants could likely exculpate themselves if they could show loss causation.

B. THE MAJORITY OF THE POST-*HALLIBURTON II* COURTS HAVE
PLACED A HEAVY BURDEN OF PROOF ON DEFENDANTS
TO REBUT THE BASIC PRESUMPTION

In addition to the post-*Halliburton II* courts' restrictive approach to the price impact argument, the post-*Halliburton II* courts have placed the heavy burden of both persuasion and production on defendants to rebut the Basic Presumption, in contrast to placing only the burden of production on defendants. As discussed below, the burden of proof also has a correlative effect on class certification outcomes.

In moving for class certification, plaintiffs bear the burden of persuasion and production.¹²⁴ However, the burden of proof in the rebuttal phase is unclear. Relevant language from *Halliburton II* ambiguously provides that “defendants should at least be allowed to defeat the presumption at the class certification stage *through evidence* that the misrepresentation did not in fact affect the stock price.”¹²⁵ Justice Ruth Bader Ginsburg’s concurrence to the *Halliburton II* decision attempts to require defendants to rebut the Basic Presumption by carrying the burden of persuasion, stating “the Court recognizes that it is incumbent upon the defendant to show the absence of price impact.”¹²⁶ Nevertheless, the language from the majority opinion leaves open the possibility that defendants bear the burden of production *or* persuasion to show lack of price impact.¹²⁷

If defendants bear the burden of persuasion—a higher burden than the burden of production—then they must “convince the fact-finder to

124. See *supra* Section II.B.

125. *Halliburton II*, 573 U.S. 258, 279 (2014) (emphasis added).

126. *Id.* at 284 (Ginsburg, J., concurring).

127. *Id.* at 268–69, 276 (“Halliburton contends that defendants should at least be allowed to defeat the presumption at the class certification stage *through evidence* that the misrepresentation did not in fact affect the stock price. We agree.”) (emphasis added).

view the facts in a way that favors that party.”¹²⁸ However, if defendants bear the burden of proof, then they must “introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict.”¹²⁹

In application to the securities class action context, defendants’ burden of proof massively changes the quantum of evidence necessary to show a lack of price impact. This difference is highlighted in the two scenarios below:

Scenario 1: Suppose that plaintiffs successfully invoke the Basic Presumption and then the burden of production shifts to defendants to rebut the presumption. In that circumstance, it would be sufficient for defendants to show a lack of price impact on the front-end—or back-end if they so choose—because this would satisfy the burden of production to “convince the fact-finder to view the facts in a way that favors that party.”¹³⁰ The burden of proof would then shift to plaintiffs to discharge their burden of persuasion by showing that either: (A) front-end price impact is unreliable because of the price maintenance theory and/or (B) there was back-end price impact.

Scenario 2: Suppose that plaintiffs are able to invoke the Basic Presumption and the burden of production and persuasion shift to defendants to show a lack of price impact. In that case, defendants would have to prove either: (A) a lack of price impact on the back-end; or (B) that the price maintenance theory is inapplicable as a predicate for showing lack of front-end price impact. These are the two options available to defendants because plaintiffs will be able to invoke the price maintenance theory by merely alleging it by virtue of the fact that they only bear the burden of production—not the burden of persuasion. In that case, the burden of production and persuasion will shift back to defendants to either: (A) disprove the application of the price maintenance theory; or (B) show the lack of back-end price impact (which as discussed, is harder to prove if there are multiple negative statements on the same day).

In scenario 1, the defendants can win by showing lack of price impact on the front-end, while in scenario 2, the defendants have a much higher burden of showing lack of price impact on the back-end or disproving the application of the price maintenance theory—either of which is a heavy

128. *Burden of Persuasion*, BLACK’S LAW DICTIONARY (10th ed. 2014).

129. *Burden of Production*, BLACK’S LAW DICTIONARY (10th ed. 2014).

130. *Id.*

lift for defendants. Accordingly, the burden of proof issue has a significant effect on class certification.

*1. Bases for Arguing That Defendants Bear
the Burden of Persuasion or Production*

Pursuant to Federal Rule of Evidence (“FRE”) 301, in a civil case, defendants, by default, bear the burden of production to defeat a presumption unless a superseding statute or the FRE provides otherwise.¹³¹ This rule codifies the “Thayer Presumption,”¹³² and rejects the “Morgan Presumption.”¹³³ Under the Morgan Presumption, the party against whom a presumption is directed bears both the burden of persuasion and production to destroy the presumption.¹³⁴ The Morgan Presumption requires a heightened showing, above the Thayer Presumption, to rebut a presumption in order to prevent presumptions from being eliminated too easily.¹³⁵ Nevertheless, the Advisory Notes to FRE 301 make clear that Congress intentionally codified the Thayer

131. FED. R. EVID. 301 (“In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.”).

132. See *Thayer Presumption*, BLACK’S LAW DICTIONARY (10th ed. 2014) (also known as the “Bursting Bubble Theory,” is “[a] presumption that allows the party against whom the presumption operates to come forward with evidence to rebut the presumption, but that does not shift the burden of proof to that party”); JAMES B. THAYER, PRELIMINARY TREATISE ON EVIDENCE 339 (1898) (presumptions “throw upon the party against whom they work, the duty of going forward with the evidence”); see H.R. Rep. No. 93-650, Rule 301 (1973) (recognizing “the so called ‘bursting bubble’ theory of presumptions, whereby a presumption vanishes upon the appearance of any contradicting evidence by the other party . . .”).

133. See *Morgan Presumption*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“presumption that shifts the burden of proof by requiring the person against whom it operates to produce sufficient evidence to outweigh the evidence that supports the presumed fact”); Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937); Edmund M. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 82 (1933); Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959).

134. *Morgan Presumption*, BLACK’S LAW DICTIONARY (10th ed. 2014).

135. Morgan & Maguire, *supra* note 142, at 913 (“The [Thayer Presumption] has proved unacceptable because it is both arbitrary and unreasonable. Its unreason consists in assigning so slight and evanescent procedural effect to every presumption”); Morgan, *supra* note 142, at 82 (noting the Thayer Presumption will make it more difficult for judges to instruct juries on how to value presumptions); Cleary, *supra* note 142, at 5.

Presumption over the Morgan Presumption to avoid the risk that presumptions would effectively become irrebuttable.¹³⁶

While FRE 301 appears to apply to the burden of proof in the context of rebutting the Basic Presumption, the post-*Halliburton II* courts have not come to a clear consensus on this issue. There is a circuit split between the Eighth Circuit,¹³⁷ which applies the burden of production or FRE 301, and the Second Circuit,¹³⁸ which applies the burden of persuasion.

In *Best Buy*, the Eighth Circuit reversed the district court's granting of class certification, holding that defendants only bore the burden of production¹³⁹ and that defendants had successfully rebutted the Basic Presumption with "strong" and "overwhelming" evidence demonstrating lack of price impact.¹⁴⁰ In so holding, *Best Buy* relied on remarkably similar language from *Halliburton II*, thus highlighting the ambiguity in the majority's opinion in *Halliburton II*, despite Justice Ginsburg's concurrence.¹⁴¹

136. H.R. Rep. No. 93-650 at 7080, Rule 301 (1973) ("The so-called 'bursting-bubble' theory of presumptions, whereby a presumption vanishes upon the appearance of any contradicting evidence by the other party, give to presumptions too slight an effect. On the other hand, [Congress] believed that the Rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced . . . lends too great a force to presumptions."); FED. R. EVID. 301 advisory committee's note to 1972 amendment ("The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too 'slight and evanescent' an effect.") (citing *Morgan & Maguire*, *supra* note 142, at 913).

137. See, e.g., *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016), *rev'g* No. 11-429, 2014 WL 4746195 (D. Minn. Aug. 6, 2014).

138. See, e.g., *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), *aff'g* 312 F.R.D. 307 (S.D.N.Y. 2016); *Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474 (2d Cir. 2018).

139. *Best Buy Co.*, 818 F.3d at 775 ("We agree with the district court that, when plaintiffs presented a *prima facie* case that the *Basic* Presumption applies to their claims, defendants had the burden to come forward with evidence showing a lack of price impact"); see also *Best Buy*, 2014 WL 4746195, at *5 (citation omitted) (holding the Basic Presumption may be defeated at class certification "through evidence that an alleged misrepresentation did not actually affect the market price of the stock . . .").

140. *Best Buy*, 818 F.3d at 782.

141. Compare *id.* (defendants "had the burden to come forward with evidence showing a lack of price impact") with *Halliburton II*, 573 U.S. 258, 279-80 (2014) ("[D]efendants should at least be allowed to defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price.").

In contrast, the Second Circuit in *Barclays*¹⁴² and *Goldman Sachs*¹⁴³ affirmed the grant of class certification, finding that defendants had not rebutted the Basic Presumption. In holding that defendants failed to rebut the Basic Presumption in both cases, the Second Circuit applied the burden of persuasion.¹⁴⁴ In *Barclays*, the Second Circuit explicitly held that “defendants seeking to rebut the *Basic* presumption must” do so “by a preponderance of the evidence at the class certification stage rather than [by] merely meet[ing] a burden of production.”¹⁴⁵

The Second Circuit provided three reasons for holding that FRE 301 did not apply. First, it read the *Halliburton II* majority and concurrence as imposing the burden of persuasion.¹⁴⁶ Second, the *Barclays* court in essence adopted the Morgan critique of the Thayer Presumption,¹⁴⁷ observing that the Basic Presumption would “be of little value if it were so easily overcome” by “simply producing some evidence of market inefficiency.”¹⁴⁸ Third, the court seized upon the language from *Halliburton II* to find that the Basic Presumption is a “substantive doctrine” that displaced the application of FRE 301.¹⁴⁹

142. *Strougo v. Barclays*, 312 F.R.D. 307, 323–27 (S.D.N.Y. 2016).

143. *Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 484–86 (2d Cir. 2018).

144. *See Waggoner v. Barclays PCL*, 875 F.3d 79, 99, 104 (2d Cir. 2017) (“[W]e conclude that defendants must rebut the *Basic* Presumption by disproving reliance by a preponderance of the evidence at the class certification stage.”); *see also Goldman Sachs*, 879 F.3d at 484–86. Note, pre-*Barclays*, the district courts within the Second Circuit had applied only the burden of production. *See, e.g., Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69, 97 (S.D.N.Y. 2015) (holding that the defendants did not rebut the Basic Presumption because they had “not presented compelling evidence of lack of price impact.”).

145. *Barclays*, 875 F.3d at 101.

146. *Id.* (holding that defendant may rebut the Basic Presumption by presenting “more salient evidence showing that the alleged misrepresentation did not actually affect the stock’s market price.”) (quoting *Halliburton II*, 573 U.S. at 282).

147. *See Morgan & Maguire, supra* note 142, at 913 (“The [Thayer Presumption] has proved unacceptable because it is both arbitrary and unreasonable. Its unreason consists in assigning so slight and evanescent procedural effect to every presumption.”).

148. *Barclays*, 875 F.3d at 100–01; *see also Morgan & Maguire, supra* note 142, at 913.

149. *Barclays*, 875 F.3d at 103 (“The Basic presumption was adopted by the Supreme Court pursuant to federal securities laws. Thus, there is a sufficient link to those statutes to meet Rule 301’s statutory element requirement.”); *see also Halliburton II*, 573 U.S. at 274 (in discussing the *stare decisis* force given to *Basic*, the Court held that “[a]lthough the presumption is a judicially created doctrine designed to implement a judicially created cause of action, we have described the presumption as ‘a substantive doctrine of federal securities-fraud law.’”) (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 462 (2013)).

The *Barclays* court attempted to distinguish *Best Buy* by noting that its holding was dictum, but “[t]o the extent that the Eighth Circuit imposed only a burden of production on defendants, we disagree with its conclusion.”¹⁵⁰ Despite the clear disagreement between the Second and Eighth Circuits, in 2018, the Supreme Court denied a writ for a petition of *certiorari* in *Barclays*.¹⁵¹

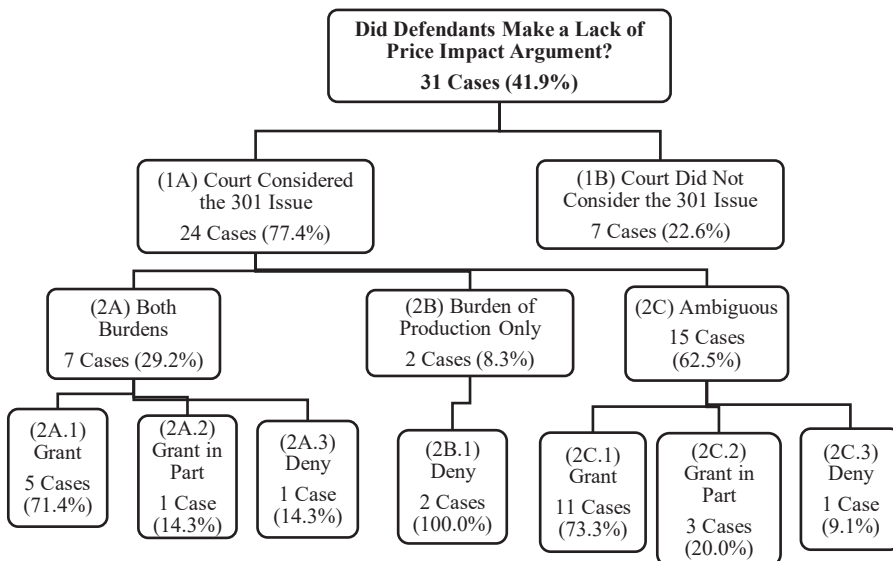
2. *The Burden of Proof Affects the Results of Class Certification Decisions*

The decision tree below reflects the outcome of class certification decisions based on the burden of proof imposed on defendants to rebut the Basic Presumption. First, it reflects whether the court addressed the burden of proof issue (“301 Issue”) when defendants raised a lack-of-price-impact argument. Second, it reflects the outcomes of those cases if the court did address the 301 Issue. Third, it addresses what burden of proof the court applied in reaching the decision that it made.

150. *Barclays*, 875 F.3d at 103 n.36 (“We do not, however, read the Eighth Circuit’s decision as being in direct conflict with our holding. The Eighth Circuit’s statement appears to be dictum because the extent of the burden was not at issue.”) (citing *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782–83 (8th Cir. 2016)).

151. *Barclays PLC v. Waggoner*, 138 S. Ct. 1702 (2018).

Decision Tree 6: Results When Courts Consider the 301 Issue



As an initial matter, of the seventy-four total district court decisions, thirty-one (41.9%) involved defendants making a lack-of-price-impact argument. Of those thirty-one cases, the courts have addressed the 301 Issue (1A) in the vast majority of cases—twenty-four cases (77.4%)—while they did not consider the burden of proof issue (1B) in a mere seven cases (22.6%).

Looking next at the precise burden of proof that the courts imposed, the courts had three options: (A) apply both the burden of persuasion and proof as the Second Circuit did in *Barclays* and *Goldman Sachs*; (B) apply the burden of production as the Eighth Circuit did in *Best Buy*; or (C) waffle on the issue by providing an ambiguous answer, such as holding: “[d]efendants have the burden of showing an absence of price impact.”¹⁵²

Analyzing the outcomes reveals a correlation between the burden of proof imposed and the outcome of the class certification decision. Intuitively, when the post-*Halliburton II* courts imposed both burdens on defendants, defendants were less likely to rebut the presumption of reliance. In particular, when the post-*Halliburton II* courts imposed the burdens of persuasion and production on defendants, plaintiffs obtained

152. See, e.g., *Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 672 (S.D. Fla. 2014); *McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 434 (S.D.N.Y. 2014).

an outright grant (2A.1) in five cases (71.4%). The post-*Halliburton II* courts granted certification in part (2A.2) and denied it outright (2A.3) in one case apiece (14.3%). The outcomes track similarly when the post-*Halliburton II* courts apply an ambiguous standard of proof on defendants, as plaintiffs obtain an outright grant of class certification (2C.1) in eleven cases (73.3%); grant in part (2C.2) in three cases (20.0%); and have granted an outright denial (2C.3) in one case (9.1%).

Despite the small number of cases, these statistics suggest highly favorable odds for plaintiffs to obtain a grant of class certification when courts impose both burdens on defendants. Additionally, the data suggests that when the post-*Halliburton II* courts impose an ambiguous standard on defendants, it has the same effect on the results obtained by defendants as if the court imposed both burdens.

Nevertheless, the pendulum swings in favor of defendants when the court imposes the burden of production only. In those cases, defendants have obtained outright denials of class certification in both cases (2B.1). Overall, these numbers tend to demonstrate that: (A) the courts cannot agree on the proper burden to place on defendants to rebut the Basic Presumption; and (B) the outcome of the case hinges on the burden of proof that the court imposes on defendants.

IV. PROPOSAL

As noted above, despite general expectations that *Halliburton II* would level the playing field at class certification, in practice, the post-*Halliburton II*, defendants have not fared well at class certification and have fared even worse when they have asserted a price impact argument. Even if non-meritorious claims have been “weeded out” at the class certification phase, plaintiffs’ high success rate reflects an imbalance that is highly resistant to meritorious defenses. Thus, the question remains: what changes are needed for a meritorious defense to prevail while also enabling strong claims to obtain class certification?

A. DEFENDANTS SHOULD BE ALLOWED TO SHOW LACK OF FRONT-END PRICE IMPACT

The Supreme Court or Congress ought to consider adopting the following proposal: regardless of the burden of proof placed on defendants, they should be allowed to show lack of front-end price impact

as satisfying their burden of proof to rebut the Basic Presumption. There are several reasons why this should be the case.

Proving lack of front-end price impact is entirely consistent with *Halliburton II* and *Basic*'s prescriptions that defendants may rebut the Basic Presumption by "[a]ny showing that severs the link between the alleged misrepresentation and either the *price received (or paid)* by the plaintiff."¹⁵³ In other words, defendants could rebut the Basic Presumption if they were to do something that severed reliance at the front-end when the plaintiff(s) paid for the stock, or at the back-end when the plaintiff(s) received money as a result of their selling the stock. Moreover, *Halliburton II* noted that defendants could make such a showing by demonstrating that "the asserted *misrepresentation (or its correction)* did not affect the market price of the defendant's stock."¹⁵⁴ These parts of Chief Justice John Roberts' decision make clear that the Supreme Court intended that defendants be able to rebut the Basic Presumption through evidence severing the link either at the front- or back-end. That is, not necessarily requiring back-end severance. Though not definitive, this language was likely intentional because it is consistent with the Fifth Circuit's holding that "[p]rice impact . . . can be established in two ways: either by showing (1) that the stock price increased following the allegedly false positive statements or (2) that there was a corresponding decrease in price following the revelation of the misleading nature of these statements."¹⁵⁵ Thus, allowing front-end lack of price impact is consistent with both *Halliburton II* and *Basic*.

Additionally, requiring a showing of lack of back-end price impact may prove unreliable. In conducting an event study to show market efficiency and price impact, it is imperative to use a window period of time, as opposed to the single day that the truth came to the market.¹⁵⁶ This is because an "analysis of a single day may not tell the whole story

153. *Halliburton II*, 573 U.S. at 268–69 (emphasis added) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988)).

154. *Id.* at 279–80 (emphasis added).

155. *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423, 432 n.6 (5th Cir. 2013).

156. Madge S. Thorsen, Richard A. Kaplan, & Scott Hakala, *Rediscovering the Economics of Loss Causation*, 6 J. BUS. & SEC. L. 93, 111 (2006) (The cause-and-effect relationship is "premised on . . . whether there are statistically significant price movements in reaction to company specific news, market forces, and industry forces" on more than one day).

in some situations.”¹⁵⁷ As *Basic* and its progeny have recognized, the truth may “leak” out.¹⁵⁸ If the truth leaks out before the end of the class period, then the amount of price impact may be muted and thus would be an unreliable metric for courts to rely on.¹⁵⁹ However, because of *Halliburton I*’s holding that defendants may not challenge loss causation or explain a muted price reaction, courts are requiring defendants to show an unreliable figure. Under *Halliburton I*, defendants have one hand tied behind their back because they cannot even argue why that back-end price impact is unreliable.¹⁶⁰

For these reasons, the Supreme Court or Congress ought to adopt a measure that overrules the application of the price maintenance theory and allow defendants to rebut the Basic Presumption with front or back-end price impact.

157. *Id.*; see *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (“In many cases, a representative sample is ‘the only practicable means to collect and present relevant data’ establishing a defendant’s liability.”) (citation omitted).

158. *Basic*, 485 U.S. at 248–49 (“[I]f petitioners could show that the ‘market makers’ were privy to the truth . . . and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken Similarly, if . . . news of the [truth] credibly entered the market and dissipated the effects of the misstatements, those who traded [on the affected company’s] shares after the corrective statements would have no direct or indirect connection with the fraud.”); see also *Howard v. Liquidity Servs. Inc.*, 322 F.R.D. 103, 130 n.16 (D.D.C. 2017) (recognizing that the truth can “leak” into the market, thus revealing the truth with respect to the specific misrepresentations alleged) (quoting *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 40 (2d Cir. 2009)).

159. Thorsen, Kaplan, & Hakala, *supra* note 166, at 110–12 (the situations making it unreliable to make a market-efficiency argument based on data from one date include: “(1) where the dissipating impact of bad news is muted by prior leakage; (2) where the dissipating impact of leakage is itself muted by confounding inflationary events such as denials by management; and (3) omissions cases, where had the truth been known, the price would have dropped, and statistically significant price increases will therefore not be manifest”); Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on Amgen and the Second Coming of Halliburton*, 57 ARIZ. L. REV. 37, 45 (2015) (“But once the inquiry extends to a potentially lengthy period of time between the original lie and the corrective disclosure, it is likely that there will be many intervening or supervening events that also make their way into the correction, making it hard—if not impossible—to disentangle all the effects with any econometric rigor.”).

160. See John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1, 16–17 (2015) (citation omitted) (“If there is no price impact in an efficient market, not only can there be no materiality, there can also be no causation, no damages, and no claim . . .”).

B. COURTS NEED TO HOLD PLAINTIFFS TO THEIR BURDEN OF PROOF

Regardless of the burden placed on defendants at class certification, plaintiffs have the duty to demonstrate, not merely plead, compliance with all of the Rule 23 elements.¹⁶¹ Moreover, at class certification, the court has “a duty to actually decide [a question of fact or law relevant to the class certification motion], and not accept it as true or construe it in anyone’s favor.”¹⁶²

Yet in practice, many courts presume the applicability of the price maintenance theory without any affirmative or particularized argument by plaintiffs. In numerous instances, courts will assume the price maintenance theory applies—even if plaintiffs do not allege it in their class certification papers—by averring that the price maintenance theory “can” apply or that “it is possible” for it to apply.¹⁶³ Other courts excuse plaintiffs’ failure to plead the application of the price maintenance theory at all because the theory is “consistent” with plaintiffs’ theory, effectively making the argument on plaintiffs’ behalf.¹⁶⁴ Additionally, some courts will also entitle plaintiffs to use the price maintenance theory based on plaintiffs’ speculative factual arguments.¹⁶⁵ For example, a district court

161. See *supra* Section II.B; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011) (holding that the moving party “must affirmatively demonstrate . . . compliance with the Rule . . .”).

162. *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1234 (11th Cir. 2016) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013)).

163. See, e.g., *Hatamian v. Advanced Micro Devices, Inc.*, No. 14-cv-00226, 2016 WL 1042502, at *7 (N.D. Cal. Mar. 16, 2016) (“It is also possible that a misstatement could serve to maintain the stock price at an artificially inflated level without also causing the price to increase further.”) (citation omitted); *Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 673 (S.D. Fla. 2014) (“[I]t is still possible that the alleged misrepresentation offset some unexpected event or information that would have negated to some extent the market effect of [the fraud].”); *McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 434 (S.D.N.Y. 2014) (noting defendants’ lack of front-end price impact argument was “flawed” because “[a] material misstatement can impact a stock’s value either by improperly causing the value to increase or by improperly maintaining the existing stock price”).

164. See, e.g., *Cooper v. Thoratec Corp.*, No. 14-cv-0360, 2018 U.S. Dist. LEXIS 77729, at *11–12 (N.D. Cal. May 8, 2018) (“Defendants’ argument that Plaintiffs fail to allege a price maintenance theory is not well-taken” because the price maintenance theory was “entirely consistent with Plaintiffs’ theory . . . [thus] Plaintiffs here not need not allege . . . inflation maintenance.”).

165. Brief for Former SEC Officials and Law Professors as Amici Curiae Supporting Petitioners at 14–15, *Barclays PLC v. Waggoner*, 138 S. Ct. 1702 (Mar. 30, 2018) (No. 17-1209) (*cert. denied*) (arguing that it is error for a court to adopt price maintenance “whenever a plaintiff speculates that a misstatement ‘maintained’ an ‘inflated’ stock price,” thus causing a court to “ignore the most direct evidence of no price impact—that

adopted the price maintenance theory based on plaintiffs' expert's speculation that it was "possible" that a misstatement "could" maintain price levels and therefore the price maintenance theory "can" apply.¹⁶⁶ Nevertheless, some courts have already rejected the price maintenance theory, not on the merits, but on the basis that plaintiffs failed to plead it with requisite particularity.¹⁶⁷

Thus, far from (1) placing the burden on plaintiffs to affirmatively discharge their burden of production and persuasion and (2) not accepting questions of law or fact as true or "constru[ing them] in anyone's favor,"¹⁶⁸ courts are doing exactly the opposite by either: (A) relieving plaintiffs of this burden entirely; (B) excusing failure to plead because the court could determine the theory was consistent with plaintiffs' theory; or (C) allowing plaintiffs to successfully speculate as to the theory's application. While this level of deference may be acceptable in the arena of Fourteenth Amendment due process,¹⁶⁹ this is inconsistent with plaintiffs' burden of proof in the arena of securities fraud class action litigation. The burden of proof placed on defendants is one of the critical factors in determining the outcome of a class certification motion.¹⁷⁰ As it currently stands, the post-*Halliburton II* courts hold defendants to a stringent standard, while they do not hold plaintiffs to a similar standard. If defendants present direct evidence of the lack of price impact, plaintiffs

there was no increase in a stock price 'on the dates that the purported misstatements . . . were made.'").

166. *Hatamian*, 2016 WL 1042502, at *7 ("[L]ack of a statistically significant price increase does not necessarily equate to lack of price impact. As [plaintiff's expert] explains, a misrepresentation *may* not cause a statistically significant change in price because misstatements are not made in a vacuum and other information *can* offset or confound the effects of a particular misrepresentation *It is also* possible that 'a misstatement *could* serve to maintain the stock price at an artificially inflated level without also causing the price to increase further.'" (emphasis added) (quoting *City of Livonia Emps.' Ret. Sys. v. Wyeth*, 284 F.R.D. 173, 182 (S.D.N.Y. 2012)); Lead Plaintiff's Reply Memorandum of Law in Further Support of its Motion for Class Certification and to Appoint Class Representatives and Class Counsel at 17–22, *Willis v. Big Lots, Inc.*, No. 2:12-cv-00604 (S.D. Ohio Sept. 9, 2016).

167. *See In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 461 (S.D.N.Y. 2000) (noting that price maintenance theories are prone to being "speculative and hypothetical"); *see also In re Credit Suisse First Bos. Corp. (Lantronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137, 145 (S.D.N.Y. 2008) (rejecting "price maintenance theory" that was "based not on facts but on speculation").

168. *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1234 (11th Cir. 2016) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013)).

169. *See generally Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (relying on speculative language to sustain state law).

170. *See supra* Section III.B.3.

should not be able to defeat this evidence by alleging, without proof, that there was a price impact at the time alleged misstatements were made.¹⁷¹

CONCLUSION

The post-*Halliburton II* courts' interpretation and application of *Halliburton II* has made it less likely for corporate defendants to be able to defeat class certification. Although *Halliburton II* may have given defendants the ability to make a new argument that they were previously not able to make, it is an argument that counterintuitively works against defendants and leads to the grant of class certification in most cases. When responding to a class certification motion, defendants should bear in mind the results of making such arguments.

171. See Brief for Former SEC Officials and Law Professors as Amici Curiae in Supporting Petitioners at 4, *Barclays PLC v. Waggoner*, 138 S. Ct. 1702 (Mar. 30, 2018) (No. 17-1209) (*cert. denied*).